

Claimant appeared by her attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffrey E. King appearing for C. Stanley Nelson of Salina, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Norman R. Kelly of Salina, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record listed in the Award of the Administrative Law Judge. Additionally, the parties stipulated into the record the medical report of Jere G. Sutton, D.O., dated January 8, 1987, which contained the results of a medical examination and evaluation of the claimant. The Administrative Law Judge also, at the request of the respondent, took official notice of an unpublished Court of Appeals decision, Evelyn J. Gutierrez v. Wesley Towers, No. 65,266 (12-21-90), in regard to a previous work-related back injury involving the claimant.

STIPULATIONS

The stipulations contained in the Administrative Law Judge's Award are adopted by the Appeals Board.

ISSUES

The issues requested by claimant for Appeals Board review are:

- (1) Nature and extent of claimant's disability.
- (2) Payment of outstanding medical expenses in the amount of \$2,253.67 as authorized medical expenses.
- (3) Claimant's eligibility for vocational rehabilitation benefits.

The respondent raised, at oral argument before the Appeals Board, the following issue:

- (4) The liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The claimant claims she injured her low back, left shoulder, and neck on February 29, 1992, while working as a certified nurses assistant (CNA) for the respondent. The respondent does not dispute that claimant received an injury to her tailbone as a result of the February 29, 1992, work-related accident. However, the respondent does dispute whether claimant also injured her left shoulder and neck in such accident.

After claimant's injury, she was returned to work for the respondent at a comparable wage on or about May 14, 1992. Claimant remained employed by the respondent until November 1992, when she was terminated for excessive absenteeism. Claimant contends the absenteeism was a result of the injuries she received in the February 29, 1992, accident.

In contrast, respondent argues that claimant's absenteeism resulted from an intervening accident that occurred in July 1992, while employed by the respondent. Claimant did not file a workers compensation claim for that intervening accident. The claimant argues she is entitled to a work disability and the respondent argues claimant is limited to permanent partial general disability benefits based on her functional impairment. See K.S.A. 1991 Supp. 44-510e.

The Administrative Law Judge denied claimant's request for work disability and awarded claimant permanent partial general disability benefits based on claimant's functional impairment. The Administrative Law Judge also denied claimant's request for payment of medical expenses in the amount of \$2,253.67 as authorized medical expenses, denied any liability to the Fund, and did not address the vocational rehabilitation benefit issue.

The Appeals Board finds the Administrative Law Judge's Award should be affirmed except for the vocational rehabilitation issue not addressed by the Administrative Law Judge. The Appeals Board also finds the Administrative Law Judge has set out in his Award detailed and accurate findings of fact and conclusions of law supported by the record. There is no need to reiterate those findings and conclusions in this Order. Therefore, the Appeals Board adopts those findings and conclusions as its own as if specifically set forth in this Order.

(1) The Administrative Law Judge limited claimant's permanent partial disability benefits to 8 percent based on the permanent functional impairment rating found in the independent medical examination report of Philip R. Mills, M.D., dated April 27, 1993. The Administrative Law Judge had ordered an independent medical examination of claimant by Dr. Mills for the purpose of examining claimant and expressing an opinion on her permanent functional impairment. The Administrative Law Judge denied claimant's request for a higher work disability award, finding that claimant had returned to work for the respondent following her February 29, 1992, accidental injury at a comparable wage. Although claimant was terminated by the respondent for excessive absenteeism, the Administrative Law Judge found claimant had failed to relate such absenteeism to her February 29, 1992, injury. Therefore, the Administrative Law Judge found the no work disability presumption contained in K.S.A. 1991 Supp. 44-510e had not been overcome.

The Appeals Board finds the Administrative Law Judge's conclusion that claimant was not entitled to a work disability is supported by the testimony of claimant's treating physician, orthopedic surgeon Dr. Ely Bartal. Dr. Bartal's testimony and medical treatment

records admitted into evidence at his deposition established that claimant's original injury that occurred at work on February 29, 1992, was relatively minor finally being diagnosed as a bruised tailbone with bruising of the surrounding muscle. Although Dr. Bartal placed permanent work restrictions on claimant and further opined claimant had a 5 percent permanent functional impairment as a result of the injury, he admitted that he based those conclusions on claimant's subjective complaints and found no objective findings. Dr. Bartal testified that according to claimant's initial physical examination, he had concluded that she suffered from a bulging or herniated disc. However, an MRI examination revealed no abnormalities.

The Administrative Law Judge concluded that claimant's attendance problems were the result of an intervening accident at work and not a result of the original February 29, 1992, accidental injury. The Appeals Board finds this conclusion also is supported by the record as claimant made no complaints to either of her treating physicians, Dr. Fredrick J. Farmer, III, or Dr. Ely Bartal, in regard to shoulder, neck, or arm discomfort until she was pushed against a table by a patient in July of 1992. Then, after that incident, claimant testified she missed some two-and-a-half weeks of work because of her injuries. Thereafter, in November 1992, the respondent terminated claimant for excessive absenteeism. The Kansas Court of Appeals in a case factually similar to this case affirmed the district court's decision that denied claimant a work disability where the claimant was returned following a work-related accident to work at a comparable wage and later was terminated for excessive absenteeism. See Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

(2) Claimant obtained medical treatment on her own after respondent terminated her employment. Claimant requested a total of \$2,253.67 be awarded for those medical expenses. Those bills were specifically contested by respondent. However, the Administrative Law Judge denied claimant's request finding the record did not contain a copy of the medical expenses and there was no evidence in the record as to whether those medical expenses were reasonable and necessary for the treatment of claimant's February 29, 1992, injury. The Appeals Board affirms the Administrative Law Judge's decision. The Appeals Board finds that the record of evidence does not substantiate that those medical expenses were reasonable and necessary to treat claimant's injuries and therefore claimant is limited to the maximum unauthorized medical expense allowance of \$350 contained in K.S.A. 1991 Supp. 44-510(c).

(3) The vocational rehabilitation issue was not listed as an issue in the Administrative Law Judge's Award. Also, that issue was not raised as an issue by the claimant at the regular hearing. The Appeals Board finds the only place in the record that the vocational rehabilitation issue is raised is in claimant's submission brief to the Administrative Law Judge. However, all parties argued the issue before the Appeals Board and no objection was made to it being considered.

On the date of the regular hearing, August 3, 1994, claimant was unemployed. However, she had only been unemployed for two weeks and gave a history of numerous places she had worked after she was terminated in November 1992 by the respondent. Those jobs ranged in pay from \$206 per week to \$277 per week plus room and board. Claimant's preinjury average weekly wage was found to be \$258.14 per week. The Appeals Board finds claimant has demonstrated she possess the ability to earn at or near a comparable wage and, therefore, the Appeals Board finds that vocational rehabilitation benefits as provided by K.S.A. 1991 Supp. 44-510g would not be necessary to restore to the claimant the ability to earn comparable wages.

(4) The Administrative Law Judge denied the request of the respondent to shift liability to the Fund for the benefits awarded the claimant. The Administrative Law Judge found the respondent had failed to prove that claimant was, at the time that she was employed by the respondent, a "handicapped employee." The Appeals Board agrees with that finding and concludes the claimant established through her testimony that following her 1986 work-related back injury she was asymptomatic for approximately three years before she went to work for the respondent on June 3, 1991. Furthermore, as determined by the district court and affirmed by the Court of Appeals, claimant suffered no permanent partial disability as a result of her 1986 work-related back injury. See Evelyn J. Gutierrez v. Wesley Towers, No. 65,266 (12-21-90).

The Appeals Board is mindful that claimant testified she did not inform the respondent of her 1986 back injury because she felt that if she did, the respondent would not hire her. The respondent argues, since claimant failed to inform the respondent of her previous back injury, knowledge of claimant's preexisting handicap is conclusively presumed because the claimant misrepresented she did not have an impairment or handicap. See K.S.A. 1991 Supp. 44-567(c). The Appeals Board finds, since claimant was not a handicapped employee as defined in K.S.A. 44-566(b) (Ensley), at the time she was employed by the respondent, K.S.A. 44-567(c) does not apply. Therefore, the Appeals Board affirms the Administrative Law Judge's decision that the Fund does not have any responsibility for any portion of the Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated July 1, 1996, should be, and is hereby, affirmed as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Evelyn Gutierrez, and against the respondent, Parkview Manor/Beverly Enterprises, and its insurance carrier, National Union Fire Insurance Company, for an accidental injury which occurred on February 29, 1992, and based upon an average weekly wage of \$258.14.

Claimant is entitled to 10 weeks of temporary total disability compensation at the rate of \$172.10 per week or \$1,721, followed by 405 weeks at the rate of \$13.77 per week or \$5,576.85 for an 8% permanent partial general disability, making a total award of \$7,297.85.

As of December 15, 1997, there is due and owing claimant 10 weeks of temporary total disability compensation at the rate of \$172.10 per week or \$1,721 followed by 292.29 weeks of permanent partial compensation at the rate of \$13.77 per week in the sum of \$4,024.83, for a total of \$5,745.83, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,552.02 is to be paid for 112.71 weeks at the rate of \$13.77 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund has no liability for any portion of this award.

The Appeals Board orders that the claimant's request for vocational rehabilitation benefits is denied.

All remaining orders of the Administrative Law Judge contained in the Award are approved and adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
C. Stanley Nelson, Salina, KS
Norman R. Kelly, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director